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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-7321

JAMES EDWARD DYE, ET AL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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James Edward Dye, Willard Eugene Cupp, James Harold Ervin, Gene Galyon, James Sanford Burnette, Glen Lester Hughes, Albert Truman Collins and Dale Lambert, petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on August 22, 1974.

I.

OPINIONS BELOW

The Opinion of the Court of Appeals on the original appeal on August 22, 1974 (App. A), is not yet reported. Upon filing of a Petition for Rehearing, the Court of Appeals entered an Order deleting one sentence from this Opinion (App. B). The Petition for Rehearing was then denied on October 14, 1974 (App. C).

Prior to the decision of the Court of Appeals on the original appeal, petitioners had filed in the District Court for the Eastern District of Tennessee, Northern Division, a Motion for a New Trial on the ground of newly-discovered evidence. This Motion was denied by the District Court by Memorandum and Order on March 20, 1974 (App. D). The Court of Appeals affirmed the District Court's denial of an evidentiary hearing or new trial on October 30, 1974 (App. E).

On November 5, 1974, an Order was entered in the Supreme Court extending the time within which to file a Petition for a Writ of Certiorari until December 13, 1974.

II.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

III.

STATUTES INVOLVED

The federal statutes involved are 18 U.S.C. §2 [Act of June 25, 1948, Ch. 645, 62 Stat. 684; Act of October 31, 1951, Ch. 655, Sec. 17b, 65 Stat. 717]; §3 [Act of June

25, 1948, Ch. 645, 62 Stat. 684]; §4 [Act of June 25, 1948, Ch. 645, 62 Stat. 684]; §371 [Act of June 25, 1948, Ch. 645, 62 Stat. 701] and §659 [Act of June 25, 1948, Ch. 645, 62 Stat. 729; Act of May 24, 1949, Ch. 139, Sec. 13, 63 Stat. 91], as are the Fourth and Fifth Amendments to the Constitution.

Pertinent statutory provisions are set forth in App. F.

IV.

QUESTIONS PRESENTED

1. A warehouse was searched illegally by local officers, resulting in a seizure of a portion of a shipment of stolen cases of whiskey. After surveillance, a U-Haul truck parked immediately outside the warehouse, padlocked, but with keys still in the ignition, was also seized, and turned over to the FBI. The FBI then prepared an affidavit for a search warrant, containing information received after it had possession of the U-Haul, but containing no factual information concerning loading or unloading of cases of whiskey into the U-Haul other than provided by an informant through a local officer who had participated in the illegal search of the warehouse. The affidavit did not reveal the circumstances of the search of the warehouse and seizure of the truck. A warrant was issued and the search of the U-Haul by the FBI resulted in discovery of the remainder of the whiskey. At the trial, the government relied only on the contraband found in the U-Haul. QUESTION: Under these circumstances, did the defendants charged with possession of the whiskey, have a "constructive possession" of the contraband sufficient to confer standing to contest the search of the truck as the "fruit of the poisoned tree"?

2. Did petitioners, accused of a crime where possession was an essential element of the offense, under the circumstances set forth in Question (1), have automatic standing to contest the seizure of the contraband it contained under *Jones v. United States*, 362 U.S. 257?

3. Did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to deny the petitioner Dye due process of law, and call for an exercise of the Supreme Court's power of supervision, by specifically stating in its original opinion affirming Dye's conviction that certain assignments of error raised by Dye had not been considered because they ". . . are not likely to be identical upon a retrial of his case", and then, upon the question being raised by Petition to Rehear, deleting by Order the sentence so stating and denying the Petition to Rehear on the ground that it raised no new issues not considered upon original submission of the case?

4. Was Dye denied due process of law where he filed, in support of a Motion for a New Trial on the ground of newly-discovered evidence, a report by a nationally-recognized polygraph expert which confirmed the truth of important recantations of evidence by the principal government witness at the trial, and the district court decided the Motion on affidavits and denied an evidentiary hearing, thus depriving Dye both of the opportunity to present a proper foundation for the introduction of scientific evidence in a circuit which has never precluded the admission of polygraph test results, and the opportunity to test by cross-examination the credibility of government affiants?

V.

STATEMENT

Petitioners (other than Dye) were all convicted in the United States District Court for the Eastern District of Tennessee, Northern Division, of conspiracy to steal a quantity of whiskey then in interstate commerce [18 U.S.C. §371, 659]. Burnette and Ervin were further convicted of the actual theft [18 U.S.C. §§2 and 659]. Cupp, Galyon, Hughes, Lambert and Ervin were convicted of possession of the stolen whiskey [18 U.S.C. §§2 and 659]. Dye was convicted of being an accessory after the fact to the theft in assisting one conspirator, the principal government witness, who entered a plea of guilty to the conspiracy count, to change his appearance [18 U.S.C. §3], and of misprision of a felony by concealing the same and not making known the commission of the felony to any judge or other person in civil or military authority [18 U.S.C. §4].

The theft took place on July 28, 1972, and the contraband, 1250 cases of whiskey, was unloaded into a warehouse the same day. On July 29th a number of cases of whiskey were loaded onto a U-Haul truck which was parked outside the warehouse. The rear of the truck was padlocked; the keys were left in the ignition. The principal government witness testified that Burnette, Hughes, Cupp and Galyon were the persons who did the loading.

During the evening of July 29th, Knox County Deputies, acting on a tip, went to the warehouse. The Chief Deputy then obtained an arrest warrant for a "John Doe" for a stolen outboard motor. On his return, the warehouse was broken into and a quantity of whiskey, less than the total amount stolen, was discovered. After surveillance, the whiskey was loaded into a second truck. Both trucks

were then driven to the county jail and the U-Haul was delivered to FBI Agents, unopened and unsearched.

On August 2nd, an affidavit for search warrant for the U-Haul was prepared. Grounds alleged for search of the U-Haul were that it concealed cases of fifths of whiskey which were "the fruits of the theft of whiskey which constituted interstate commerce". Apart from the facts obtained from employees of the distillery stating the fact of the theft of the whiskey on July 28th, identification of the trailer and identification numbers on the cases of whiskey, all information contained in the search warrant was stated as having been obtained by the Government after the U-Haul was in the custody and control of the FBI.

The only factual allegations concerning handling of the cases of whiskey were (a) a "reputable citizen's" report to the FBI that on the 29th he had seen a tractor-trailer in the alley next to the warehouse and cases of whiskey being *unloaded* [presumably into the warehouse], and a U-Haul being driven into the alley at a later time; and (b) a report from the Chief Deputy [who had participated in the illegal search of the warehouse and seizure of the U-Haul] that an informant reported he had seen a man loading or unloading cases of whiskey from the U-Haul parked by the warehouse. The warrant contained no factual information as to how the FBI came into possession of the vehicle. The Affidavit for search warrant is reproduced as App. G.

Based upon the affidavit, a search warrant was issued by a federal magistrate, and the U-Haul was searched on August 3rd. Additional whiskey was discovered in the truck, upon the theft and possession of which Counts III and IV of the indictment were based. At the trial, the Government relied only upon the whiskey found in the

truck. Petitioners moved to suppress evidence of the cases of whiskey found in the U-Haul during the search of the U-Haul by the FBI.

The indictment, Count I, alleging a conspiracy [18 U.S.C. §371] contained the following alleged overt acts with reference to the U-Haul truck:

> 18. On or about July 29, 1972, Willard Eugene Cupp, a/k/a Bill Cupp, and Gene Galyon, a/k/a "Lefty" Galyon, rented a U-Haul truck from Fountain City American U-Haul, 4839 North Broadway, in the name of Douglas G. White. . . .
>
> 21. On or about July 29, 1972, Willard Eugene Cupp, a/k/a Bill Cupp, Gene Galyon, a/k/a "Lefty" Galyon, Steven Eugene McFee, a/k/a Steve McFee, James Sanford Burnette, a/k/a Jim Burnette, and Glen Hughes loaded a quantity of Jack Daniels Black Label Whiskey, in fifths, from 4666 Walker Boulevard, Knoxville, Tennessee, into a U-Haul truck parked in the alley at said location.

The District Court held that the petitioners had no standing to challenge the search, having claimed no possessory interest in the U-Haul; further, that there was probable cause for issuance of the federal search warrant, the seizure and search of the U-Haul, and the subsequent seizure of contraband it contained, and that the search of the U-Haul truck was not "tainted" by the earlier action of the local authorities.

The Sixth Circuit affirmed, holding that petitioners charged with possession in the indictment had no automatic standing to challenge the search when they failed to establish a possessory interest in the whiskey or the U-Haul at a hearing where none of their testimony could be used at a subsequent trial. The Sixth Circuit did not reach the

issue as to whether action of the Knox County officers tainted the search which FBI agents made pursuant to the warrant issued by the federal magistrate.

On the original appeal, petitioner Dye cited ten (10) Assignments of Error. Five (5) Assignments of Error were not discussed or mentioned by the Court of Appeals. The Opinion filed August 22, 1974 [Exh. A to Appendix] stated:

> "Dye has raised a number of other issues in his separate brief, but these either were not raised in the District Court or concern themselves with matters of evidence, instructions and trial rulings which *are not likely to be identical upon a retrial of his case*." [Emphasis added.]

Dye filed a timely Petition for Rehearing wherein it was pointed out that the above-quoted statement was entirely inconsistent with the Court's affirmance of his conviction. On September 12, 1974, the Court of Appeals ordered that the quoted words be deleted from the Opinion [App. B] and subsequently denied the Petition for Rehearing on the ground that each issue raised therein was considered by the Court at the original submission of the case [App. C].

Subsequent to the filing of appeal from the judgment of the district court, petitioners filed a Motion for a new trial in the district court on the ground of newly-discovered evidence under F.R.C.P. Rule 33. The Motion was predicated upon an eighty (80) page sworn statement of the principal government witness recanting his trial testimony, as a result of which three (3) principal allegations were made in the motion: (1) evidence was introduced at the trial derived from illegally intercepted wire or oral communications in violation of Tit. 18 U.S.C. §2515 et seq., (2) the government failed to produce Jencks Act state-

ments (Tit. 18 U.S.C. §3500 et seq.) dealing with telephone conversations between the principal government witness and an FBI agent, when the witness was in North Carolina with Dye; (3) the FBI agent, through promises and inducements as to granting of probation and dropping of pending State charges, undue pressure and corrupt means, illegally and unlawfully perverted the testimony of the principal government witness at the trial, and that evidence favorable to the defendants was concealed from the United States Attorney.

Attorneys for Dye arranged for the principal government witness to submit to a polygraph examination by a nationally-recognized polygraph expert prior to filing the Motion. In the opinion of the polygraph expert attached as an exhibit to the Motion, the principal government witness was telling the truth on essential matters in his sworn statement, including matters relating to Dye which, if true, would negate the witness' testimony upon which Dye was convicted of being an accessory after the fact to the conspiracy (Count IV, 18 U.S.C. §3) and misprision of the felony (Count V, 18 U.S.C. §4).

The government countered the Motion by filing a quantity of affidavits by various government employees and others who disputed the credibility of the principal government witness, including a convicted felon who had been incarcerated with the witness.

The district court overruled the Motion and declined to grant petitioners an evidentiary hearing at which the evidence of the polygraph expert could have been presented and the credibility of government affiants, especially the FBI agent who allegedly made the promises of probation, and the convicted felon, could have been tested by cross-examination.

The Sixth Circuit Court of Appeals affirmed [App. E] denying petitioners' contentions that the district court abused its discretion in overruling the Motion and denying petitioners an evidentiary hearing.

VI.

REASONS FOR GRANTING THE WRIT

(a) *The Court of Appeals erred in holding that petitioners had no standing to challenge the search of the U-Haul truck, and that the evidence found during the search was not tainted by the actions of the local officers.*

There is no question under the facts that the search of the warehouse was illegal. There is also no question that the discovery of a portion of the stolen cases of whiskey led directly to the surveillance of the U-Haul truck parked immediately outside the warehouse, its subsequent seizure by the county officers, and possession of the U-Haul being turned over to the FBI. Possession of the cases of whiskey in the truck was thus removed from the accused charged with the count of the indictment alleging possession, as a result of the illegal activities of the county officers.

The facts here are thus distinguishable from those in *Brown v. United States*, 411 U.S. 223 (1973) where this Court expressed doubt that an accused could claim constructive possession of goods in the hands of a co-conspirator, for here actual possession of the goods lay in the government.

The Sixth Circuit relied on *Brown*, 411 U.S. at 229, in that those accused in the possessory count "were not charged with an offense that includes, as an essential

element of the offense charged, possession of the seized evidence at the time of the contested search and seizure", and further stated that "There was no direct evidence that any of the defendants except Frye was ever in possession of the U-Haul truck or the whiskey it contained."

In a Petition to Rehear it was brought to the attention of the Court of Appeals that principal government witness McFee testified that appellants, Burnette, Hughes, Cupp and Galyon, loaded a portion of the stolen whiskey onto the U-Haul on July 29, 1972. The evidence [Tr. pp. 249-251] is set forth as App. H. There was, therefore, direct prosecution evidence of possession of whiskey found during the illegal search of the warehouse. The issue of "constructive possession" of the whiskey in the U-Haul, for purposes of standing to challenge the subsequent search of the truck while in the possession of the government, is thus squarely presented here, where it was not properly raised in *Brown*, note 4, 411 U.S. at 230.

Inasmuch as removal of actual possession of the U-Haul *and the whiskey it contained* was the direct and proximate result of the illegal search of the warehouse, the subsequent search of the U-Haul, albeit under warrant, necessarily had its origin in the initial tainted search. Given standing, the search of the U-Haul and discovery of the whiskey with possession of which these petitioners were convicted, was tainted and the "fruit of the poisoned tree" under the doctrine of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and *Nardone v. United States*, 308 U.S. 338 (1939).

Petitioners further assert that the subsequent search warrant obtained by the FBI on the basis of information allegedly received after the truck was in its possession does not erase the taint of the illegal search of the ware-

house and seizure of the U-Haul. We maintain that actual knowledge or at least a very strong inference that the balance of the stolen shipment of whiskey was in the U-Haul, was derived from the illegal warehouse search and the proximity of the U-Haul parked immediately outside, which by its very nature as a vehicle used for transport. The information presented to the magistrate in the affidavit, which did not reveal the circumstances under which the truck came into FBI possession, is confirmation only, and not sufficient to show an independent origin. *Cf. United States v. Paroutian*, 299 F.2d 486 (1962), especially in light of the fact that the only independent information given to the FBI concerning handling of the cases of whiskey related to *unloading of the cases from the tractor-trailer into the warehouse* [App. G]. The information concerning a man loading or unloading whiskey from the U-Haul came to the FBI from the Chief Deputy of the Sheriff's Department, who had himself participated in the illegal search of the warehouse under the spurious "warrant", and the seizure of the U-Haul truck. We thus assert that the evidence to which objection was made, granting establishment of the primary illegality, was the proximate result of exploitation of that illegality, *Wong Sun v. United States*, 371 U.S. 471 at 488, and that the connection between the warehouse search and U-Haul seizure, and search, had not become so attenuated so as to dissipate the taint. *Nardone v. United States*, 308 U.S. 338, 341.

The requisite standing lies in the "constructive possession" of the whiskey removed from the possession of the accused as the direct result of the illegal search of the warehouse. Otherwise there is clearly present the vice of allowing the government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes—the taking

"advantage of contradictory positions". *Brown v. United States*, 411 U.S. at 229, *Jones v. United States*, 362 U.S. at 263.

(b) *Petitioners had automatic standing to challenge the search of the U-Haul, being charged with an offense where possession is an essential element of the offense.*

The doctrine of "automatic standing" under *Jones v. United States*, 362 U.S. 257, in the light of the ruling of *Simmons v. United States*, 390 U.S. 377 (1968) is also before the Court. *Brown* did not reach the question of the effect of *Simmons'* holding that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection, on the automatic standing of *Jones*.

Petitioners believe that *Simmons* does not make the automatic standing doctrine unnecessary, and that the same compelling reasons for conferring automatic standing in cases where possession at the time of the contested search and seizure is an essential element of the offense charged, remain, despite the opportunity to present evidence at the hearing without its later admission into evidence.

In summary, we believe that in this case, where there is: (1) a conspiracy, (2) a theft, (3) possession of contraband, (4) an illegal search of premises and recovery of a portion of contraband (cases of whiskey) less in number than the total quantity of contraband known to have been stolen, (5) seizure of a U-Haul truck parked immediately outside the premises on the strong inference that it contains the remainder of the contraband, (6) issuance of a

search warrant for the U-Haul upon information supporting the inference obtained after the seizure, (7) search of the U-Haul and seizure of the balance of the contraband — that the transaction is continuous, and the search of the U-Haul necessarily had its origin in the initial illegal search. The evidence seized from the U-Haul is the "fruit of the poisoned tree" under the doctrine of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) and *Nardone v. United States*, 308 U.S. 338 (1939) and the factual elements alleged in the affidavit are not sufficient to furnish proof that independent grounds for search of the U-Haul existed at the time of the seizure of the vehicle.

(c) ***The Court of Appeals erred in sustaining the district court's denial of Dye's Motion for a new trial on the ground of newly discovered evidence, and denying an evidentiary hearing.***

The district court denied Dye's motion for a new trial [App. D] and refused to grant an evidentiary hearing. The Court of Appeals affirmed [App. E].

While Motions for New Trials may be decided upon affidavits, *United States v. Johnson*, 327 U.S. 106 (1946), *United States v. Hoffa*, 382 F.2d 856 (6th Cir. 1967), *cert. den.* 390 U.S. 924, denial of an evidentiary hearing deprived Dye of the opportunity to place before the district court the evidence of a nationally-recognized polygraph expert whose examination of the principal government witness confirmed the truth of essential elements of his sworn statement, recanting trial testimony which resulted in Dye's conviction. The Court of Appeals for the Sixth Circuit has never precluded introduction of the results of polygraph examinations upon the laying of a proper foundation, *United States v. Tremont*, 351 F.2d 144, 146 (6th

Cir. 1965), *cert. den.* 383 U.S. 944 (1966). Other circuits have noted the requirement for a proper foundation, *United States v. Chastain*, 435 F.2d 686, 687 (7th Cir. 1970), *United States v. Wainwright*, 413 F.2d 796, 802-803 (10th Cir. 1969).

The government took the position that no proper foundation had been laid for admissibility in the district court. The district court merely noted the examination results [App. D] but apparently did not consider the results as bearing upon the truth of the recantation. Without an evidentiary hearing, Dye was denied the opportunity to test the credibility of government affiants, particularly the convicted felon Carl Robinson upon whose evidence the district court commented at some length, and the FBI agent who, the principal government witness alleged, had promised him probation and the dropping of State charges then pending.

There thus is framed the important legal issue as to whether it is a denial of due process to preclude one moving for a new trial on grounds of recantation of a principal government witness, from laying a proper foundation for the introduction of scientific evidence supporting the truth of the recantation, by denying an evidentiary hearing at which the foundation could have been laid.

We agree that motions for new trials are treated with great suspicion and are not to be granted lightly, *U. S. v. Johnson*, 327 U.S. 106. Nonetheless, we believe that where scientific evidence in support of the motion is presented which requires extensive foundation prior to a decision on admissibility, that the case falls under those exceptional circumstances where oral hearing should be held, under the principles ennunciated in *United States v. Crowder*, 351 F.2d 101, 104-105 (6th Cir. 1965), and

Lyles v. United States, 272 F.2d 910, 912 (5th Cir. 1959), especially where admission of this type of evidence has never been precluded in the circuit where the case arises, *U. S. v. Tremont*, 351 F.2d 144 (6th Cir. 1965), *supra*. The most diligent efforts of counsel for a movant, to establish the truth of a recantation of evidence of a government witness, are nullified, and we believe due process under the Fifth Amendment was denied in this instance.

This appears especially to be true where there is evidence of a promise made to a government witness prior to his testimony and there is evidence that the witness testified falsely at trial. The circumstances here are closely analagous to those in *DeMarco v. United States*, 415 U.S. 449 (1974), where this Court stated the issue should have been disposed of in the District Court *after an evidentiary hearing*.

(d) *The Court of Appeals' apparent failure to review a number of petitioner Dye's Assignments of Error denied him due process of law in review of his conviction.*

Where appeals are provided for, the proceedings in a court of appeals are a part of the process of law under which the petitioner's convictions must stand or fall. *Cole v. Arkansas*, 333 U.S. 196. Yet in the course of proceedings before the Sixth Circuit Court of Appeals, the face of the record indicates that in consideration of assignments of error raised by the petitioner, James Dye, the Court failed to consider certain of the assignments, for the reason as stated in the initial opinion filed, that they were ". . . not likely to be identical upon a retrial of his case."

By deleting this sentence from its opinion [App. B] and then denying the Petition to Rehear on the ground that all issues had been considered upon original submission of the case [App. C], the record reflects that assignments of error twice presented to the Court were not considered in reviewing Dye's conviction. The basic maxim of jurisprudence, that justice must not only be done, but it must be seen to have been done, has not been followed. Dye submits that this procedure so far departs from the ordinary and usual course of judicial proceedings as to have denied him due process of law, and call for an exercise of this Court's supervisory powers further to review the actions of the Court below.

VII

SUMMARY AND CONCLUSION

Petitioners respectfully contend that the courts below erred in failing to hold that the evidence seized during the search of the U-Haul truck was the "fruit of the poisoned tree", the illegal search of the warehouse by local authorities which led to seizure of the U-Haul; and in failing to hold that petitioners had standing to contest the U-Haul search on the basis of either (a) the "automatic standing" doctrine of *Jones v. United States*, 362 U.S. 257, or (b) the "constructive possession of the contraband at the time of the contested search and seizure. Petitioner Dye further contends (a) that he was denied due process of law in the Sixth Circuit Court of Appeals in light of the court's apparent failure on the face of the record to consider five (5) of his assignments of error, and (b) that he was denied due process by the district court's denial of his motion for a new trial on grounds of newly-discovered evidence, or an evidentiary hearing, which deprived him of the right to present scientific evidence confirming the recantation of

the principal government witness, and the right to cross-examine government affiants, including the FBI agent who allegedly made promises, inducements and threats to the principal government witness prior to trial.

Petitioners respectfully submit that this Court should issue a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit, and that petitioners' convictions should be reversed and their cases remanded to the district court for a new trial.

Respectfully submitted,

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APPENDIX A

[fol. 1] Nos. 73-1876-83

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

JAMES EDWARD DYE	73-1876
WILLARD EUGENE CUPP	73-1877
JAMES HAROLD ERVIN	73-1878
GENE GALYON	73-1879
JAMES SANFORD BURNETTE	73-1880
GLEN LESTER HUGHES	73-1881
ALBERT TRUMAN COLLINS	73-1882
DALE LAMBERT	73-1883

Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed August 22, 1974.

Before: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. On July 27, 1972 a trailer owned by Superior Trucking Services, Inc. was loaded with 1250 cases of Jack Daniels whiskey at a distillery in Lynchburg, Tennessee for delivery to a warehouse in North Carolina. When the driver who was dispatched to

pick up the load of whiskey arrived at Lynchburg, the trailer was not there. The empty trailer was found in Monroe County, Tennessee on July 30. Meanwhile, at about 7:00 o'clock in the evening of July 29 two Knox County, Tennessee deputy sheriffs, acting on a tip, went to the area behind a building at 4666 Walker Boulevard in Knoxville and found a padlocked U-Haul truck
[fol. 2] parked near the rear of the building. Shortly thereafter the chief deputy sheriff of the County joined them and left the other two deputies in the area while he went for a search warrant. After the chief deputy returned, a door at the rear of the building at 4666 Walker Boulevard was forced open, and 100 cases of Jack Daniels whiskey were found in the building. The officers then arranged for a truck to be rented and when it was brought to the location, they loaded the whiskey from the building into the truck. This work was completed by about 4:00 a.m. on July 30 and at that time both the U-Haul truck which had remained unopened and the other rental truck which had been loaded with the whiskey from the building were taken to the county jail. The U-Haul truck was delivered to FBI agents unopened and unsearched.

The chief deputy sheriff testified that he had a report on the stolen whiskey before he went to the Walker Boulevard address but that the search warrant he obtained was for a stolen outboard motor and not the whiskey. He stated that he had no information on the U-Haul truck when he got the warrant for the outboard motor. The sheriff of Knox County also testified that he went to the rear of the Walker Boulevard address at about 11:30 p.m. on July 29 and that the other officers were inside the building where the whiskey was found. He notified the FBI to determine whether a federal offense had been committed

since he had had no official reports of stolen whiskey at that time. After the FBI agents took possession of the U-Haul truck it was moved to a privately owned lot. On July 31 the FBI had a key made for the padlock on the rear of the truck. On August 2 a search warrant was obtained from a federal magistrate on the basis of a detailed affidavit. The truck was searched on August 3, and 416 cases of Jack Daniels whiskey were removed from it. This whiskey was identified as being part of the shipment which was stolen on July 27 or 28.

On November 14, 1972 a five-count indictment was returned naming 12 defendants. All of those indicted except the defendant James Edward Dye were charged in count one with a conspiracy to steal the whiskey. A total of 22 overt acts was listed with each of the eleven conspiracy defendants being involved in at least one such act. The second count charged the defendants James Sanford Burnette and James Harold Ervin with the act of stealing and carrying the whiskey away and aiding and abetting each other. In the third count, eight of the defendants were charged with possessing the whiskey with knowledge that it had been stolen. The defendants Collins, Frye and Hales, though charged in the conspiracy, were not included in the charges of counts two or three. The fourth and fifth counts named only the defendant James Edward Dye, who had not been named in any of the first three. In count four, Dye was charged with being an accessory after the fact and in count five, with misprision of felony. The charges against Dye referred to transactions between him and the defendant Steven Eugene McFee which occurred shortly after the theft of the whiskey.

[fol. 3]

Upon arraignment, all defendants except McFee pled not guilty. McFee pled guilty and gave testimony which implicated the other defendants. At the conclusion of a trial which lasted four days the jury rendered the following verdict:

Count 1: Cupp, Galyon, Lambert, Collins, Burnette, Hughes, Ervin and Hales — guilty; Frye and Lay — not guilty.

Count 2: Burnette and Ervin — guilty.

Count 3: Cupp, Galyon, Burnette, Hughes, Lambert and Ervin — guilty; Lay — not guilty.

Count 4: Dye — guilty.

Count 5: Dye — guilty.

All who were convicted except the defendant Hales have appealed.

[fol. 4] At a pretrial hearing, the government stated that it would not rely on any whiskey taken from the premises on Walker Boulevard nor on the search of those premises. It was stipulated that the only whiskey that would be introduced in evidence would be a portion of that taken from the U-Haul truck by the FBI. It was also agreed that all objections by any defense counsel would be treated as made on behalf of all defendants. At the same time, motions for severance were overruled and a hearing was set on a motion to suppress evidence consisting of the whiskey taken from the U-Haul truck.

The suppression hearing was held on December 8, 1972 and at the conclusion thereof the court ruled that the defendant Frye (who was subsequently acquitted by the jury) was the only one who had standing to object to the search

of the U-Haul truck and seizure of the whiskey. Frye was a service station operator who testified that he had leased the truck on July 29 to a person who identified himself as Douglas White and that the truck had been returned to him the following week by the FBI together with a copy of a search warrant and inventory showing that 416 cases of whiskey were removed from the truck on August 3. Subsequently the court ruled that since Frye had leased the truck he was not a person aggrieved within the meaning of Rule 41(e), Fed. R. Crim. P., and that therefore none of the defendants had standing to suppress the evidence. The court went on to hold that even if the defendants did have standing, there was probable cause for issuance of the search warrant by the United States magistrate and that the FBI search of the U-Haul truck and seizure of the whiskey was not "tainted" by the previous activities of the state officers.

Sufficiency of the Evidence

In oral argument counsel for the government virtually conceded that there was insufficient evidence to sustain the conviction of the defendant Burnette under Count 2. Our examination of the record confirms that the only evi-
dence that Burnette engaged in the actual theft
[fol. 5] of the whiskey was contained in the confession
of the defendant Ervin, and the jury was not permitted to hear those portions of the confession which incriminated other defendants. Upon remand, the charge against Burnette in Count 2 will be dismissed.

No attempt will be made to give a detailed statement of the evidence in this case. Although the other defendants claim that they were entitled to acquittal because of failure of the government to prove all elements of the of-

fenses with which they were charged, the record does not support these claims. Following conviction, we view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Luxenberg*, 374 F.2d 241, 248 (6th Cir. 1967). The prosecution sought to establish some elements of the offenses by circumstantial evidence. It is well settled in this jurisdiction that it is not necessary that circumstantial evidence remove every reasonable hypothesis except that of guilt. *United States v. Scales*, 464 F.2d 371 (6th Cir. 1972). With the exception noted as to Burnette, we find that the evidence introduced by the government, together with the reasonable inferences which may be drawn therefrom, was sufficient to support the verdict of the jury. Much of the argument on sufficiency of the evidence put forward by the defendants relates to credibility and weight, matters which are within the exclusive province of the jury. By pointing out contradictions in the evidence and arguing that the testimony of McFee should not be given great weight, the defendants merely emphasize the fact that the record does contain substantial evidence which supports the verdict.

Time Allotted for Closing Argument

All the defendants also complain that the court limited the time for the closing argument to one hour and forty minutes to the side, which was approximately ten minutes for each defendant. In conference with the at-
[fol. 6] torneys, the court suggested that they apportion the time as they saw fit but told them that if they could not apportion it, the clerk would allow ten minutes to each attorney for the defense. As shown by the fact that seven of the defendants have filed a joint brief in this court, many of the issues in this case were common

to several defendants. Thus it was not necessary for each attorney to argue every issue, and the court offered to permit them to divide the allotted time in any way they desired. This is a matter which is left to the discretion of the trial judge, and we find no abuse of discretion.

The Court's Charge to the Jury

Two of the defendants allege error in the failure of the court to give alibi instructions. Burnette and Lambert introduced witnesses who testified as to their whereabouts during a portion of the time when the government witness McFee had testified they were involved in handling the stolen whiskey. The record does not indicate a formal request for an instruction covering these alibi defenses, and at the conclusion of the charge the court noted that it did not believe that "the alibi business applies. This was a conspiracy charge." No objection was made to this ruling. The defendant in a criminal case is entitled to instructions on every theory which he puts forward and supports by evidence. *Marson v. United States*, 203 F.2d 904, 912 (6th Cir. 1953). Even assuming that the defendants properly brought the alibi theory to the attention of the court, an examination of the testimony of the alibi witnesses discloses that they did not account for the presence of either defendant at a place other than the scene of the activities related to the stolen whiskey in such a way as to preclude the possibility that the defendants were actually there at the times testified to by government witnesses. This is so because the so-called alibi witnesses failed to account for large segments of the critical period of time. We believe that the general charge to the jury adequately protected the rights of these defendants.

Appendix A

[fol. 7] **Use of Defendant Ervin's Confession**

The defendant James Harold Ervin gave a detailed statement to an FBI agent while he was being held in the Rome, Georgia jail on other charges. When the government sought to introduce the statement during trial of this case, there was an objection made out of the hearing of the jury which put in issue the voluntariness of the statement. The court then excused the jury and received the testimony of the FBI agent who had taken the statement from Ervin and Ervin's testimony. Ervin claimed that he gave the statement under duress after the FBI agent had threatened to revoke the probation of Ervin's wife unless he gave a statement about the stolen whiskey. The FBI agent categorically denied making such a threat and testified that he knew nothing about Ervin's family circumstances at the time he took the statement. The court ruled that Ervin's statement was freely and voluntarily given and the FBI agent was permitted to testify concerning the statement. As instructed by the court, the witness did not mention the names of any persons other than Ervin in reciting the contents of the statement, but referred to "this man," "another man" and similar designations with respect to other persons whose activities were recited in the statement.

The district court followed the procedure prescribed in *Jackson v. Denno*, 378 U.S. 368 (1964), by hearing the witnesses out of the presence of the jury and making his own determination that the statement of Ervin was voluntary. Furthermore, the court instructed the jury that it was not to consider the confession of Ervin unless it found that the statement was voluntarily given. Actually this instruction was unnecessary since the only objection to admission of the statement was made out of the hearing

of the jury and no defendant made an effort to get before the jury any evidence which would put the voluntariness of the statement in issue. *United States v. Goss*, 484 F.2d 434 (6th Cir. 1973). Our examination of the entire record with respect to the statement of Ervin [fol. 8] leads to an independent determination that it was given voluntarily. See *Davis v. North Carolina*, 384 U.S. 737, 741-742 (1966).

Post-Trial Voir Dire of Jury

Shortly after the trial was concluded, the attorney who had represented the defendant Dye was contacted by one of the jurors who intimated that there has been some irregularity in the deliberations of the jury. It was arranged that the attorney would meet the juror at breakfast the next morning and that two other attorneys who had represented defendants in the case would accompany him. The attorney first contacted filed a statement with the court relating these facts and stating that in the conversation the next day the juror indicated that he had been induced to vote "guilty" with respect to two defendants that he thought were innocent in order to obtain the votes of other jurors to acquit the defendants Frye and Lay. The court called the juror and conducted a hearing in chambers in which the attorney first contacted by the juror, the United States Attorney and the juror were present. The court excluded the other attorneys who had participated in the trial but furnished them with a transcript of the interrogation of the juror. It is now claimed that all of the defendants were entitled to conduct a post-trial voir dire of the entire jury. No such motion appears in the record. The district judge conducted a limited voir dire of the juror who had contacted the attorney and determined that his revelations were not of sufficient gravity to impair

the verdict of the jury or to justify further inquiry. Proper functioning of the jury system requires that jurors be free of post-trial inquisition and harrassment. See *Stein v. New York*, 346 U.S. 156, 178 (1953). All of the jurors had stated in open court that the verdict in this case was their own verdict, and nothing contained in the affidavit of the attorneys or the limited inquiry of the one juror would have justified a voir dire of the entire jury.

[fol. 9] **Seizure and Search of the U-Haul Truck**

When the state officers took possession of the U-Haul truck and drove it to the police station, none of the defendants was present. The police had been in the area for nearly nine hours, and no one had appeared to claim the truck. Though the body of the truck was padlocked, the ignition key was in the cab which was unlocked. The close proximity of the truck to the warehouse, and its apparent abandonment were justification for removing the truck from the public alley at 4:00 a.m. Compare *Cady v. Dombrowski*, 413 U.S. 433, 442-443 (1973). So far as the record shows, none of the defendants except Frye ever claimed any connection with the truck. Without a showing of an interest in the property or the right to control it, they have no standing to suppress the evidence taken from the truck. *United States v. Wells*, 437 F.2d 1144 (6th Cir. 19/1). The defendants cite *Mancusi v. DeForte*, 392 U.S. 364 (1968) for the proposition that one need not claim ownership of the property searched to establish standing. However, that decision did not eliminate the requirement that one at least have some possessory interest in the property searched in order to have standing. No such showing was made by any of the defendants.

The defendants indicted in count three contend that they have "automatic" standing to seek suppression of the whiskey taken from the U-Haul truck under the holding of *Jones v. United States*, 362 U.S. 257 (1960). In that case, the Supreme Court noted the dilemma of one accused of a crime in which mere possession is sufficient for conviction. The Court stated:

> The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e), *Id.* at 264.

The dilemma referred to in *Jones* of requiring one to admit possession and, thus incriminate himself, [fol. 10] in order to establish standing, was removed by the holding in *Simmons v. United States*, 390 U.S. 377 (1968). That case dealt with a non-possessory offense and the Court noted that even in this type case a defendant might be deterred from making a motion to suppress by the fact that his evidence in the suppression hearing would be prejudicial if introduced at his trial. The rule set forth in *Simmons*, is that—

> [W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. *Id.* at 394.

In *Brown v. United States*, 411 U.S. 223 (1973), the Supreme Court did not reach the question of whether the *Simmons* rule makes the "automatic" standing doctrine of *Jones* unnecessary. That question is squarely before us here with respect to the convictions under count three of the indictment because possession is "an essential

element of the offense. . . charged" in that count. *Brown v. United States*, *supra* at 228. In this case, the motion to suppress was made on behalf of all defendants. Yet only Frye testified at the suppression hearing and his statement showed that he surrendered possession of the truck under a leasing agreement which covered the period when the defendants were charged in count three with illegal possession of the whiskey. The third count of the indictment charges possession of stolen whiskey on or about July 28th. The U-Haul truck was first observed on July 29th, parked in an alley with keys in the ignition. It was not seized until July 30th, following surveillance, and was searched on August 3rd. Thus the defendants convicted under count three were not charged with possession at the time of the contested search and seizure. In *Brown*, the Supreme Court held:

> In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) [fol. 11] were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary of possessory interest in the premises; and (c) *were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure*. The vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes, is not present. The Government cannot be accused of taking "advantage of contradictory positions." (citations omitted, emphasis added) 411 U.S. at 229.

There was no direct evidence that any of the defendants except Frye was ever in possession of the U-Haul truck or the whiskey it contained. There was evidence that the defendants were seen in possession of other Jack Daniels whiskey while unloading it from the hijacked tractor-trailer into the warehouse. The whiskey taken from the U-Haul truck was part of the same shipment. In the light of *Simmons*, we do not believe these defendants had automatic standing when they failed to establish some possessory interest in the whiskey or the truck at a hearing where none of their testimony could be used in the subsequent trial. The defendants in this case have not established that they are the ones "against whom the search was directed" or that they had a right of privacy with respect to the U-Haul truck or its contents. See *Jones v. United States*, 362 U.S. at 261. Thus we do not reach the issue of whether actions of the Knox County officers "tainted" the search which the FBI agents made pursuant to the warrant issued by a federal magistrate.

Use of Previous Statements of Witnesses

Several persons called as government witnesses made answers which apparently conflicted with statements they had previously given to FBI agents. The witnesses were then asked about the previous statements and [fol. 12] the defendants objected on the ground that the prosecution could not cross-examine its own witnesses. The district attorney informed the court that the answers surprised him and he was permitted to proceed. It is not clear from the record whether portions of the statements were read to the witnesses or whether the questions were merely based on the statements. Nor does the record reveal that the prosecution knew in advance that the answers of the witnesses would be different

from their narrative statements. Having claimed surprise, the prosecuting attorney could properly bring out the prior inconsistent statements of a witness. Necessary foundations as to time, place and circumstances of the previous statements were laid. Under these circumstances it was within the discretion of the trial court whether to permit cross-examination of the prosecution witnesses. *Poliafico v. United States*, 237 F.2d 97, 108-109 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

The defendants Galyon and Cupp were implicated by the out-of-court statement of the witness Dalton and their counsel objected, and when overruled, requested an admonition that the statements could not be considered by the jury unless the FBI agents were produced for a formal confrontation. The court refused to give such an instruction at that time and indicated that it would be included in the charge at the conclusion of proof. The FBI agents who had taken the statements did testify later, but no one questioned them about the out-of-court statement of Dalton. Thus, the right of confrontation claimed by counsel was afforded, but the defendants chose not to pursue the matter.

The courts should be alert to prevent abuse of the prior inconsistent statement rule by the prosecution's use of extra-judicial statements in the guise of impeaching witnesses, when the true purpose is to get before the jury substantive evidence which is not otherwise available. See *United States v. Crowder*, 346 F.2d 1 (6th Cir.), *cert. denied*, 382 U.S. 909 (1965). It is well settled in this jurisdiction that it is error not to give a requested instruction limiting consideration by the jury [fol. 13] of an out-of-court statement to impeachment purposes. *United States v. Barnes*, 319 F.2d 290 (6th Cir. 1963). However, none of the defendants in

this case requested an instruction so limiting the Dalton statement, but rather objected on other grounds. In this circuit, failure to give a limiting instruction with respect to the use of extra-judicial statements is plain error. Rule 52(b), Fed. R. Crim. P.; *United States v. Lester*, 491 F.2d 680 (6th Cir. 1974). However, we conclude in view of the other evidence of guilt of the defendants Galyon and Cupp, that the failure to give an instruction in this case was harmless beyond a reasonable doubt. See *Schneble v. Florida*, 405 U.S. 427 (1972); *Glinsey v. Parker*, 491 F.2d 337 (6th Cir. 1974), *cert. denied*, ___ U.S. ___, 42 U.S.L.W. 3647 (U.S. May 28, 1974).

The Jencks Act Statements

Prior to trial the prosecution furnished to the defendants eleven statements which the witness McFee had made in connection with the case. After the trial was over the attorneys for the defendants realized that one of the FBI agents had testified on cross-examination that he had participated in securing 19 statements from this witness. A motion was made in the district court for a hearing to determine if the Jencks Act, 18 U.S.C. §3500, had been complied with. The case was on appeal to this court when the motion was made, and the government moved for a remand to the district court for the purpose of holding a hearing to determine if the missing statements were covered by the Jencks Act and, if so, whether any prejudice resulted from failure to produce them. The matter was remanded to the district court where a hearing was held on May 25, 1973. The district judge held that the eight documents were "statements" within the Jencks Act, but that failure to produce them was not prejudicial.

The government argues that failure to produce the eight statements was an oversight and was clearly unintentional and that the eleven statements which were pro-
[fol. 14] duced were used by the defense for a thorough and vigorous cross-examination of McFee. While admitting that all of the interviews with McFee are "statements" covered by the Jencks Act, the government would have us treat its failure to produce them as harmless error. The eight statements which were not produced would have provided little if any additional material for cross-examination by counsel for defendants. In one —a recording of a telephone conversation—there is an ambiguous reference to the fact that "Jim" was not worried because he had done nothing wrong. Each of the three defendants whose given name is James claims prejudice from the government's failure to produce this transcript at the trial. We hold that the finding of the district court that there was no prejudice to the defendants as the result of the failure of the prosecution to produce the eight statements was not clearly erroneous. *United States v. Chitwood*, 457 F.2d 676, 678 (6th Cir.), *cert. denied*, 409 U.S. 858 (1972).

The Severance Issue

The defendants filed motions for severance, claiming that they were entitled to separate trials so that each could call as witnesses the other defendants who had made statements. This they could not do in the joint trial in which the persons giving the statements were co-defendants. The brief refers particularly to the statement of the defendant Ervin mentioned earlier in this opinion contending that the other defendants were denied their right of effective confrontation by being tried jointly with Ervin. As we have pointed out, the jury was not permitted to

know the identity of anyone referred to in the Ervin statement. We believe that the trial court correctly ruled that the other defendants were not implicated by this statement and that the joint trial did not violate their constitutional right to confront witnesses against them. *Bruton v. United States*, 391 U.S. 123 (1968).

A motion under Rule 14, Fed. R. Crim. P., for relief from prejudicial joinder is directed to the sound [fol. 15] discretion of the trial court and denial of severance is not grounds for reversal in the absence of an abuse of discretion. *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Vaughan*, 422 F.2d 812 (6th Cir. 1970); *United States v. Morgan*, 394 F.2d 973 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968). It was pointed out in *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965), that the general rule in conspiracy cases is that persons jointly indicted should be tried together and that this is particularly true where the offenses charged may be established against all of the defendants by the same evidence and which result from the same series of acts. The defendants other than Dye do not contend that joinder was improper under Rule 8, Fed. R. Crim. P., but only that it was prejudicial and that severance should have been ordered under Rule 14. The Court of Appeals for the Seventh Circuit considered such a claim in *United States v. Rogers*, 475 F.2d 821 (1973), where it stated at page 828:

> Joinder being proper, this court will reverse the trial court only if abuse of discretion is shown. The trial court is to balance possible prejudice to the defendant from joinder with the public interest in efficient use of judicial time through joint trial of defendants and offenses which are connected. In a case of

> multiple defendants, as the instant one, the showing needed for severance appears to be stronger than in a case of a single defendant with multiple counts. *See* Wright and Miller, Federal Practice and Procedure §223 (1969). (Citations omitted.)

We find no abuse of discretion in the denial of severance to the defendants named in the first three counts of the indictment.

The defendant Dye charges that Rule 8(b) of the Federal Rules of Criminal Procedure was violated by charging him in the same indictment with the other defendants. It is his position that he was not alleged to have participated in the same "act or transaction" or "in the same series of acts or transactions" constituting an offense or of-
[fol. 16] fenses as the other defendants named in the indictment. Dye was not charged with being a member of the conspiracy or committing any of the overt acts in furtherance of the conspiracy. It was alleged that he was an accessory after the fact because of assistance he gave the defendant McFee in changing his appearance and that he was guilty of misprision of felony in concealing the hijacking of the whiskey and not reporting it to proper authorities. The most important evidence against him was the testimony of the co-defendant McFee, just as McFee's testimony was basic to making out the case against all of the defendants. The fourth and fifth counts of the indictment refer specifically to McFee's possession of the stolen whiskey which is the subject of the third count of the indictment. We believe that the joinder of defendants was proper in this case because the indictment charged them separately with participation in "the same series of acts or transactions constituting . . . offenses." Although Dye was named in only two counts, this is not a case such

as *United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), where the indictment alleged no connection between the acts of a defendant named in one count and those of a defendant named in another. The indictment charged in count three that McFee was guilty of knowingly possessing property which had been stolen from an interstate shipment and counts four and five charged that Dye's illegal activities occurred at a time when he knew of McFee's commission of the offense charged in count three. The joinder of Dye in counts four and five did not violate Rule 8(b), and we find no abuse of discretion in the trial court's denial of severance.

Dye has raised a number of other issues in his separate brief, but these either were not raised in the district court or concern themselves with matters of evidence, instructions and trial rulings which are not likely to be identical upon a retrial of his case. One other claim of error should be dealt with here since it concerns the indictment. Dye claims that counts four and five of the indictment are "duplicitous" because the proof necessary for conviction of the accessory charge and for misprision of
[fol. 17] felony is identical and the offenses are not distinct. The same evidence may result in conviction of more than one offense if each such offense requires proof of a fact which the others do not. *United States v. Barnett*, 418 F.2d 309 (6th Cir. 1969). This test is satisfied with respect to the separate charges of being an accessory after the fact and misprision of felony. *United States v. Daddano*, 432 F.2d 1119, 1129 (7th Cir. 1970), *cert. denied*, 402 U.S. 905 (1971).

The judgment of the district court is affirmed except with respect to the conviction of the defendant Burnette under Count 2 of the indictment. The conviction of Burnette under Count 2 is reversed and it is directed that this charge be dismissed.

APPENDIX B

[fol. 1] #73-1876-83

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
SEP 12 1974
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA.

v.

JAMES EDWARD DYE	73-1876	
WILLARD EUGENE CUPP	73-1877	
JAMES HAROLD ERVIN	73-1878	ORDER
GENE GALYON	73-1879	
JAMES SANFORD BURNETTE	73-1880	
GLEN LESTER HUGHES	73-1881	
ALBERT TRUMAN COLLINS	73-1882	
DALE LAMBERT	73-1883	

Upon consideration, it is ORDERED that the Opinion of this Court, filed herein on August 22, 1974, be amended by deleting the first sentence of the first full paragraph on page 16, which reads:

> "Dye has raised a number of other issues in his separate brief, but these either were not raised in the district court or concern themselves with matters of evidence, instructions and trial rulings which are not likely to be identical upon a retrial of his case."

Entered by order of the Court.

John P. Hehman
Clerk

APPENDIX C

[fol. 1] Nos. 73-1877, 73-1878, 73-1879
73-1880, 73-1881, 73-1882
73-1883

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 14 1974
JOHN P. HEHMAN,
Clerk

WILLARD EUGENE CUPP, JAMES HAROLD ERVIN, GENE GALYON, JAMES SANFORD BURNETTE, GLEN LESTER HUGHES, ALBERT TRUMAN COLLINS and DALE LAMBERT

Defendants-Appellants

v.

UNITED STATES OF AMERICA

Plaintiff-Appellee

ORDER

BEFORE: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

Upon consideration of the petition for rehearing filed on behalf of the defendants-appellants herein, the court concludes that each issue raised therein was considered by the court at the original submission of this case and that the petition fails to disclose error in the opinion of the court prejudicial to the defendants-appellants.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

APPENDIX D

[fol. 1] IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

MAR 20 1974

UNITED STATES OF AMERICA
v.
JAMES EDWARD DYE, ET AL
} CRIMINAL NO. 18,041

MEMORANDUM

Defendants[1] have filed with the Court a motion pursuant to Rule 33 of the F.R.Cr.P. on the ground of newly discovered evidence. They contend that a new trial should be granted for the following reasons: (1) Evidence was introduced in this Court which was derived from illegally intercepted wire or oral communications in violation of Title 18 U.S.C. § 2515 et seq.; (2) the Government failed to produce statements under Title 18 U.S.C. §3500 et seq. (Jencks Act) dealing with telephone conversations between Steve McFee, the Government witness, and Jack
[fol. 2] McGivney, Special Agent for the F.B.I., when

[1]Defendant, James Edward Dye, filed the first motion for new trial and was later joined by defendants Cupp, Ervin, Galyon, Burnette, Hughes, Collins and Lambert. The motion is predicated upon an order of the United States Court of Appeals for the Sixth Circuit denying defendants' motion to remand without prejudice to file in the District Court motions for new trial on newly discovered evidence. (6th Cir. January 25, 1974)

McFee was in North Carolina with defendant Dye; (3) Agent McGivney, through promises, inducements, undue pressure and corrupt means illegally and unlawfully perverted the testimony of McFee and further that McGivney concealed evidence favorable to the defendants from the prosecuting United States Attorney; (4) the indictment was obtained solely upon the hearsay testimony before the grand jury of Agent McGivney and, therefore, such indictment should be quashed. Defendants further contend that Steve McFee was under the influence of drugs while testifying on behalf of the Government.

In support of these contentions, defendants have filed with the Court a deposition of McFee which was taken under oath on September 21, 1973 in Asheville, North Carolina, together with a handwritten statement of McFee executed on September 20, 1973. Additionally, copies of alleged letters sent to McFee from Agent McGivney; the deposition of Mrs. Mary M. McFee, the witness' mother; the affidavit of Phillip P. Durand, attorney for defendant Dye; a report on the polygraph examination administered McFee regarding the verification of the deposition taken in North Carolina; the affidavit of Milton A. Berman, polygraph examiner; and other exhibits have been submitted. Defendants further request an evidentiary hearing for the purpose of introducing other evidence that may bear upon the merits of the motion.

[fol. 3] In response, the Government has submitted an issue-by-issue rebuttal to defendants' allegations together with some nineteen counteraffidavits of individuals who were in some way connected with the factual developments upon which the motion is based.

Notwithstanding the fact that the Court is faced with a purported recantation of testimony, in light of this lengthy

and thorough record we conclude that no meaningful relevant facts could be further adduced at an evidentiary hearing. All facts pertinent to the question of whether defendants should prevail under Rule 33 of the F.R.Cr.P. on the ground of newly discovered evidence are before the Court. Accordingly, defendants' request for an evidentiary hearing is denied. *United States v. Hoffa*, 382 F.2d 856 (6th Cir. 1967); *United States v. Dara*, 429 F.2d 513 (5th Cir. 1970); *United States v. Franco*, 434 F.2d 956 (6th Cir. 1970). Therefore, we turn to the issues herein presented.

I. Was evidence derived from illegally intercepted wire or oral communications in violation of Title 18 U.S.C. § 2515 et seq. introduced in the trial court?

To support their contentions that illegally intercepted evidence was introduced at trial, defendants rely upon the sworn deposition of Steve McFee taken in North Carolina on September 21, 1973 (hereafter referred to as the North Carolina statement). McFee asserts therein, in the main, that Agent McGivney quoted from pieces of paper
[fol. 4] the substance of a telephone conversation between Dye and McFee when McFee was in Kokomo, Indiana. McFee further states that he was shown transcripts of telephone conversations between Dye and various other defendants, which were allegedly actual transcriptions of those conversations. Also, the witness testified in the North Carolina statement that at least on one occasion he was shown by Agent McGivney a stack of transcripts which McFee interpreted as being telephone intercepts, and that it was his impression that the F.B.I. had knowledge of circumstances that they could not have known but for having monitored the actual conversations.

The Court's records reflect, and the Court specifically recalls, that one or more of the defendants moved to require the Government to provide any recordings or transcripts of any recordings which resulted from the use of electronic surveillance. The motion was denied without prejudice to the movants to renew should it be made to appear that the Government in fact employed wire tap or other electronic surveillance.

The Government then, as now, denies that any intercept, or the fruits of any intercept, was used other than the consentual monitoring of a telephone conversation between McFee and defendant Cupp, the use of which is presently before the Court of Appeals as a portion of the allegations of error. This position is clearly supported by the affidavits of Agents McGivney, Samson [fol. 5] and Estill of the F.B.I. Additionally, the Government has submitted an affidavit from the Department of Justice which reflects that no electronic surveillance was employed in the case under consideration.

The Court finds that the evidence clearly shows that no wire tap or other intercept was used by the Government and that the inferences raised by McFee's North Carolina statement have no basis in fact. Accordingly, defendants' contention is without merit. See *Alderman v. United States*, 394 U.S. 165 (1967).

II. Did the Government fail to produce a statement falling within the purview of the Jencks Act?

In his North Carolina statement, McFee testified that during the time he was with defendant Dye in North Carolina, he made a collect telephone call to Agent McGivney. Defendants seek an evidentiary hearing to determine first whether the call was made, secondly, whether any Jencks

Act statements resulted therefrom, and finally to determine whether the failure to produce a transcript of the contents of the call violated their rights under the Act.

The affidavits of Agents McGivney and Samson show that McFee did contact the F.B.I. on September 5, 1972 while he was apparently at his father's home [fol. 6] in Chandler, North Carolina. McFee at that time stated that he had not seen defendant Dye for some three weeks and further gave specific information concerning Dye's knowledge of the whiskey theft. These statements were made available to the prosecuting attorney and were subsequently made available to counsel for the defendants either before trial or upon remand on the Jencks Act issue. The affiants further deny that any telephone call was received from McFee, collect or otherwise, wherein he advised the agents that he was in North Carolina with James Dye.

It is the opinion of the Court, and the Court finds, that defendants have not presented facts sufficient to support their motion on the ground that the Government failed to produce a statement falling within the purview of Title 18 U.S.C. § 3500 et seq., namely, the contents of an alleged collect call from McFee to the F.B.I. To the contrary, the record reflects that no such collect call was made. Defendants' second contention is, therefore, without merit.

III. Was the testimony of the principal Government witness illegally and unlawfully perverted and did agents of the F.B.I. conceal from the United States Attorney evidence favorable to the defendants?

Defendants contend that McFee's North Carolina statement is replete with numerous allegations of corruption and perversion of evidence induced by Agent McGivney of

[fol. 7] the F.B.I. Specific allegations of such misconduct are as follows: (1) McGivney stated to McFee that state charges against him would be dropped and there was a 100% chance of probation if John Calhoun, a probation officer in this Court, did the presentence investigation; (2) McGivney secured employment for McFee prior to trial and made arrangements with personnel in charge of the Anderson County jail for special treatment and conjugal visitation during pre-trial confinement; (3) McGivney remained in touch with McFee and on several occasions advanced money to McFee in return for testimony favorable to the Government; (4) that McFee related to Agents McGivney and Samson the facts that he and not defendant Dye was the reason behind McFee's getting his hair colored in North Carolina and that Dye had no knowledge of this until McFee returned from his trip; (5) that McGivney deliberately lied concerning whether McGivney and Samson knew about his pending Knox County sentence and that McGivney repeated this lie on the witness stand. Finally, it is asserted that McFee told his mother, Mrs. Mary M. McFee, both during trial and afterwards, that defendant Dye was not guilty of the charges against him.

In response to these allegations, the Government asserts that (1) McFee's North Carolina statement filed with the motion constitutes an untrue document; (2) the statement was brought about by the intentional scheme
[fol. 8] of McFee to perpetrate a fraud upon the Court; and (3) the evidence offered at trial by McFee was the truth then, given voluntarily and willingly, with no promises, inducements, pressures or corruption offered or received, and that such was legally given by McFee because he was involved in and had actual knowledge of the crimes charged.

To support these contentions, the Government relies upon the affidavits of Agent John F. McGivney of the F.B.I., who was in charge of the investigation; Agent Paul J. Samson, who also investigated the case; Peggy Ann Nelson, McFee's former wife; Agent Nelson Lee Gordon, who accompanied Agent McGivney to Anderson County Jail for a pre-trial interview of McFee; John M. Calhoun, United States Probation Officer; J. Fred Brehm, United States Probation Officer in charge of McFee's presentence report; L. B. Sutton, Jr., United States Marshal; Kenneth E. Caldwell, Sheriff of Anderson County who was responsible for the care and custody of McFee prior to trial; and Archie R. Carpenter, Esq., court-appointed counsel for McFee.

Upon careful examination of these statements it is clear that no promises, inducements, undue pressure or corrupt means were employed to unlawfully pervert the testimony of McFee. Specifically, McFee's allegations as to promises of probation, special treatment [fol. 9] while in Anderson County Jail prior to trial, promises to obtain dismissal of outstanding state charges in return for testimony favorable to the Government, undue pressure in obtaining evidence sufficient to implicate defendant Dye, perjury on the part of Agent McGivney while testifying at trial, bribery, or any other illicit activity on the part of Government personnel to persuade McFee to testify falsely are simply not supported either by the affidavits or the record as a whole.

It should be noted that the Government further asserts that McFee's North Carolina statement was brought about by the intentional scheming of McFee in order to discredit both his trial testimony and the reputation of Agent McGivney. The affidavit of Carl William Robinson shows that both he

and McFee were serving sentences at Maxwell Air Force Base, Alabama, and that they had daily contact with each other and eventually became friends.

Robinson states that from the first day McFee arrived, he began talking about the whiskey case. McFee revealed that he was depressed and scared especially about the possibility that the other defendants might take some actions of reprisal. Additionally, Robinson began to realize that McFee was planning something and was asked to contact Dye upon his (Robinson's) release from prison. McFee requested that Robinson tell Dye that, if Dye and the other raise a substantial sum of money, he (McFee) [fol. 10] would change his testimony. Robinson related that if this was done, McFee's apprehension would be alleviated. This request was never fulfilled by Robinson.

The affidavit further shows that McFee, on a number of occasions, remarked to Robinson that the testimony given at trial was the truth and that McFee never mentioned any improper conduct on the part of the Government during the investigation. To the contrary, McFee apparently had praise for the F.B.I. agents involved in the case, especially Agent McGivney.

The affidavits of Brenda S. Huskey, Carolyn Jones and Frank Kobosky shed further light on the Government's position that the alleged recantation as is found in McFee's North Carolina statement was part of a scheme to discredit his prior cooperation with Government investigative personnel in an attempt to restore the confidence in him of the other defendants.

If this is true, the Court condemns such actions as reprehensible. However, since the record as a whole

clearly indicates that the statements of McFee which are the basis of this third ground for new trial are without factual support, the motion as to the issues contained in the third ground is overruled.

[fol. 11] IV. Are the defendants entitled to a new trial under Rule 33 because the indictment was allegedly obtained "solely upon hearsay testimony of Special Agent McGivney"?

Defendants here assert that a new trial should be granted on the basis of newly discovered evidence because Agent McGivney, who presented the facts on behalf of the Government to the grand jury, had no direct knowledge whatsoever regarding the involvement of the defendants in the matters alleged in the indictment returned in this cause. In support of their contention, defendants rely upon *United States v. Estepa*, 471 F.2d 1132 (2nd Cir. 1972).

Reliance upon *Estepa*, supra, under the facts of this case, is misplaced. See *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Ramirez*, 482 U.S. 807 (2nd Cir. 1973); *United States v. Powers*, 482 U.S. 941 (8th Cir. 1973). Defendants have failed to present evidence which would merit a new trial on the basis of newly discovered evidence. Additionally, we are of the opinion that defendants cannot now attack the validity of the indictment in light of their failure to do so under Rule 12(b)(2) of the F.R.Cr.P. *Davis v. United States*, 411 U.S. 233 (1973).

Accordingly, the issues asserted in ground four of the motion are without merit.

[fol. 12] V. Was Steve McFee, the principal Government witness, under the influence of drugs during the period he was testifying?

In support of this ground, the affidavit of McFee has been submitted which states that on December 13, 1972, he took "one or two pills which he believed to be 'speed'; that these pills were blue and yellow wafer type pills with a waxy exterior." Defendants assert that this precluded proper cross-examination and contributed to McFee's evidence against them.

The affidavits of Kenneth E. Caldwell, Peggy Ann (McFee) Nelson, Carolyn Jones, Ralph E. Majors and Thomas L. Townsend show that the statement made by McFee in his affidavit is not factually supported. During the trial, and on several occasions, McFee has denied the taking of any sort of drugs. The security officers in charge of this witness on the day of trial both state that they never observed his taking any drugs nor did he give any indication that he was under the influence of any such drugs. To the contrary, these officers stated that McFee volunteered without solicitation information concerning the case about which he was to testify, such information corroborating his trial testimony. Additionally, the Court had ample opportunity to, and did, observe McFee while on the witness stand. At no time did he appear under the influence of drugs or narcotics. It is, therefore, the Court's opinion that the defendants' motion as to issues presented in the final ground must be denied.

[fol. 13] In summary, the Court is constrained to make several observations. First, there was much testimony given at trial both by McFee and the other witnesses as well which sufficiently supports the verdict of the jury. While it is recognized that it was primarily

upon the testimony of McFee that defendant Dye was implicated, we are of the opinion that the purported recantation does not warrant a different conclusion. McFee's North Carolina statement in no way negates the fact that McFee accompanied Dye on the trip to North Carolina during which time McFee had his hair colored and purchased some glasses. Simply, McFee now states that it was at his own insistence and not Dye's that the attempted change of identity occurred.

Secondly, this purported change of testimony occurred under circumstances which are highly suspect, namely after McFee and Dye had spent some three days together in the home of McFee's mother in North Carolina. In light of the counter-affidavits of his former fellow prisoner and those other individuals with whom McFee had personal contact before, during and after the trial, the credibility of this purported recantation is seriously questioned.

The Court, as stated, observed the witness during the trial and heard all of the evidence introduced by the other witnesses who testified. We believed then, [fol. 14] and we believe now, that his testimony reflected the true facts. His present assertion that defendant Dye was not involved and further that undue pressures were brought to bear upon him for testimony favorable to the Government cannot, under the circumstances, be accepted.

Efforts to retry the case upon a motion of this character after a protracted trial before a jury where the witnesses were subject to extensive and thorough cross-examination are calculated to set a bad precedent as trials must end at some time. If after trial, parties can seek out those who testified and cause them to change their story, such would, if approved, weaken or possibly destroy the American system of trial by jury.

For the reasons heretofore stated, it is ORDERED that the motion for new trial on the basis of newly discovered evidence be, and same hereby is, denied.

Enter:

/s/ Robert L. Taylor
United States District Judge

APPENDIX E

[fol. 1] No. 74-1481

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES EDWARD DYE,
Defendant-Appellant.

FILED
OCT 30 1974
JOHN P. HEHMAN,
Clerk

ORDER

Before: EDWARDS, CELEBREZZE, LIVELY, Circuit Judges.

Appellants appeal from the denial of a new trial, which they requested on the basis of "newly discovered evidence." They have previously been before this Court on a direct

appeal from their convictions, *see United States v. Dye*, Nos. 73-1876-83, *filed* August 22, 1974, and this panel of the Court is fully familiar with the testimony and witnesses adduced at trial.

Upon consideration of the briefs, record, and oral argument on this appeal, we find that the District Court did not abuse its discretion in denying Appellants' motion for a new trial without an evidentiary hearing.
[fol. 2] *United States v. Hoffa*, 382 F.2d 856, 866 (6th Cir. 1967); *United States v. Johnson*, 327 U.S. 106 (1946). Accordingly, the Order of the District Court should be, and it hereby is, AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

APPENDIX F

PERTINENT PORTIONS OF TITLE 18, U.S.C.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. . . .

§ 4. Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

* * *

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United

States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

§ 659. Interstate or foreign baggage, express or freight; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

APPENDIX G

[fol. 1] UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Commissioner's Docket No. .....
Case No.....

UNITED STATES OF AMERICA

vs.

1970 Ford U-Haul Truck #5606TP7515C, Serial No. F60DCH97639, bearing 1972 Mississippi license P/20 427

AFFIDAVIT FOR SEARCH WARRANT

BEFORE HARVE M. DUGGINS Knoxville, Tennessee

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 1970 Ford U-Haul Truck #5606TP7515C, Serial No. F60DCH97639, bearing 1972 Mississippi license P/20 427, located at Middlebrook Pike and Amherst, Knoxville, Tennessee

in the Eastern District of Tennessee, there is now being concealed certain property, namely cases of fifths of Jack Daniel Black Label whiskey

which are the fruits of the theft of whiskey which constituted interstate shipment between Lynchburg, Tenn., and Raleigh, N.C., pursuant to Waybill #S7887, dated 7/27/72.

Said whiskey stolen Lynchburg, Tenn., on or about 7/28/72. Said whiskey, 1250 cases, fifths of Jack Daniel Black Label, was in an aluminum 1963 Fruehauf Trailer #173, Serial No. FHD141308, bearing 1972 Tennessee license 043-556, property of Superior Trucking Service, Chattanooga, Tenn. Said trailer was loaded and sealed at 3:00 PM, 7/27/72, pursuant to aforesaid waybill and discovered missing 8:00 AM, 7/28/72, at Lynchburg, Tenn.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On 7/28/72, Mrs. TOMMY JONES, Superior Trucking Service, Shelbyville, Tenn., advised SA DONALD W. AARON that a 1963 Fruehauf Trailer #173, Serial No. FFHD141308, bearing 1972 Tennessee license #043-556, owned by Superior Trucking Service, Chattanooga, Tenn., containing 1250 cases of fifths of Jack Daniel Black Label whiskey, consigned from Jack Daniel Distillery, Lynchburg, Tenn., under waybill #S7887, dated 7/27/72, to Jack Daniel Central Warehouse, 800-6 Semart Avenue, Raleigh, N. C., was discovered stolen on 7/28/72, at 8:00 AM, by W. L. SHIPLEY, driver, Superior Trucking Service, Chattanooga, Tenn.

DUDLEY GAULT, Jack Daniel Distillery, Lynchburg, Tenn., advised SA AARON that the cases of Jack
[fol. 2] Daniel whiskey on the above trailer are numbered consecutively 434522 to 435771, which numbers are stamped on the side of each case. The bottling date of 7/27/72, also appears on each case as well as code number of 185 and the address of the consignee, Jack Daniel Central Warehouse, 800-6 Semart Avenue, Raleigh, N. C.

On 7/31/72, a reputable citizen of Knoxville, Tenn., who desires to remain anonymous, advised Special Agents

JOHN F. McGIVNEY and GEORGE F. ZOGRAFOS that on or about Saturday, 7/29/72, at approximately 8:00 AM, this person observed a tractor-trailer backed into an alley adjoining 4672 Walker Boulevard, Knoxville, Tenn., and observed two men unloading cases of Jack Daniel whiskey from the trailer. This same individual also observed at approximately 6:00 PM, 7/29/72, a U-Haul closed van truck being driven into the alley adjoining 4672 Walker Boulevard.

On 7/30/72, Chief Deputy Sheriff ROSS SIMMS, Knox County Sheriff's Office, advised Special Agents ROBERT B. STROM and JAMES A MATTHEWS a confidential source of the Knox County Sheriff's Office, who had furnished reliable information on one other occasion, advised on Saturday, 7/29/72, that source observed a man loading or unloading cases of Jack Daniel whiskey from a U-Haul truck parked in the rear of 4666 Walker Boulevard, Knoxville, Tenn.

On 7/30/72, Detective D. L. HOBBS, Knox County Sheriff's Office, advised Special Agents ROBERT B. STROM and JAMES A. MATTHEWS he observed a U-Haul truck bearing 1972 Mississippi license P/20 427 on the night of 7/29/72, parked near the rear of 4666 Walker Boulevard, and the back doors of the van were locked.

ALVIN G. FRYE, Fountain City American U-Haul Company, 4839 North Broadway, Knoxville, Tenn., advised Special Agent JOE H. ROBERTS on 7/31/72, that U-Haul Trailer #5606TP7515C, bearing Mississippi license P/20 427, was rented at about 5:30 PM, 7/29/72, by one DOUGLAS G. WHITE, McBee Road, Knoxville, Tenn. Said WHITE furnished no identification.

Appendix G

HETTIE VAWTER, U. S. Postal Inspector's Office, Knoxville, Tenn., advised Special Agent JOHN F. McGIVNEY on 8/2/72, that there is no DOUGLAS G. WHITE residing on either McBee or Dan McBee Road, Knox County, Tenn.

Special Agent JOE H. ROBERTS made inquiry on McBee Road, Knoxville, Tenn., on 7/31/72, and determined there is no DOUGLAS G. WHITE residing on said road.

/s/ John F. McGivney
Signature of Affiant.
Special Agent, F.B.I.
Official Title, if any.

Sworn to before me, and subscribed in my presence,

/s/ Harve M. Duggins
United States Commissioner.

APPENDIX H

TRANSCRIPT OF PORTION OF TESTIMONY OF STEVEN EUGENE McFEE, PRINCIPAL GOVERNMENT WITNESS

* * *

[DIRECT EXAMINATION]

[249] Q On this morning, did you have any other connection with whiskey after you say you left and went to the pool hall with Lefty Galyon, Mr. Gene Galyon?

A No, sir.

Q When did you next have occasion to come into contact with the whiskey?

A The next day.

Q And approximately what time, sir, and what was that contact and who was present?

A I don't remember exactly what time it was. I do remember that it was in the morning.

Bill Cupp showed up, or Willard Eugene Cupp, I know him as Bill, he showed up and he was fairly nervous.

THE COURT: Showed up where?

THE WITNESS: At the pool hall, Your Honor.

THE COURT: Where is the pool hall located?

THE WITNESS: It is right beside, it is right beside where the whiskey was stored in the building. It is the same building but it is just, there was a section away from it. It is like an office building and where the buildings are.

[250] Q What if any conversation about the Jack Daniels whiskey did you have at that time and place with Mr. Cupp?

A Well, he seemed to be concerned that someone

had, you know, someone knew about what had happened and that we should move the whiskey.

Q Okay. What did you do next then?

A I was sitting there. If I am not mistaken Bill Cupp and Lefty Galyon left and I didn't know where they were going at that time. I heard they going to get a truck but I can't say for sure right now, it has been awhile.

MR. WEBSTER: I object to what he heard.

THE COURT: The objection is sustained, to what he heard.

BY MR. WILSON:

Q Tell us what you did rather than what you heard. Did Mr. Cupp and Mr. Galyon leave?

A Yes, sir, they did.

Q How long were they gone?

A I would say 30 minutes or more.

Q Do you remember what time of day this was?

A No, sir, I don't. I remember it was still before lunch.

Q Did they come back?

[251] A Yes, they did.

Q How did they come back?

A Bill Cupp in his car and Lefty Galyon driving a U-Haul truck.

THE COURT: Galyon driving what?

THE WITNESS: A U-Haul truck, Your Honor.

Q And what if anything occurred then?

A Might I say before that, prior to them returning, while I was still there, Jim Burnett showed up in the same Ford LTD that I had saw the morning before, and said that we were going to move the whiskey today.

MR. McGEE: I couldn't hear the last—

THE COURT: Read his answer.

(The answer was read by the reporter.)

BY MR. WILSON:

Q Was the whiskey moved?

A It was loaded on the U-Haul truck.

Q And who loaded it on the U-Haul truck?

A Myself, Glen Hughes, Bill Cupp and Jim Burnette and Lefty Galyon.

THE COURT: Now repeat those for me.

THE WITNESS: Myself—

THE COURT: Myself.

THE WITNESS: Bill Cupp—

THE COURT: All right.

[252] THE WITNESS: Jim Burnette—

THE COURT: All right.

THE WITNESS: Glen Hughes—

THE COURT: All right.

THE WITNESS: And Lefty Galyon.

THE COURT: All right.

BY MR. WILSON:

Q Okay, sir. How long did it take you to load the U-Haul truck?

A It took somewhere around two—I would say between one and three hours.

Q What did you do next after the truck was loaded?

A We put a padlock on the back of the truck and we closed the doors and locked it. When I say—I put the padlock on the back of the truck, let me say that.

Q Where did you get the padlock?

A Willard Eugene Cupp had went out and bought two the day before.

THE COURT: Is that a padlock on the U-Haul truck?

THE WITNESS: Yes, sir, Your Honor.

THE COURT: Who got the lock?

THE WITNESS: Willard Eugene Cupp.

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Appendix 11

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-732

JAMES EDWARD DYE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented by the petition are (1) whether the district court erred in ruling that petitioners charged with possession of stolen whiskey, had no standing to challenge the admissibility of evidence that petitioners allege was seized in violation of the Fourth Amendment, and (2) whether, as to petitioner Dye, (a) the district court erred in denying his motion for a new trial based on newly discovered evidence, and (b) the court of appeals failed to consider several of his assignments of error.

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners Burnette, Collins, Cupp, Ervin, Galyon, Hughes, and Lambert were convicted of conspiring to steal whiskey, in violation of 18 U.S.C. 371 and 659, and (except for Collins) of

possession of stolen whisky, in violation of 18 U.S.C. 2 and 659. Petitioners Burnette and Ervin were also convicted of stealing the whiskey, in violation of 18 U.S.C. 2 and 659. Petitioner Dye was convicted of being an accessory after the fact and of misprison of felony, in violation of 18 U.S.C. 3 and 4. Petitioners were sentenced to prison terms as follows: Burnette and Cupp, eight years; Collins, three years; Dye and Ervin, five years; Galyon, two years; Hughes, eighteen months; Lambert, four years. The court of appeals affirmed all convictions except that of petitioner Burnette for theft of whiskey, which it reversed (Pet. App. A).

The evidence showed a conspiracy by petitioners (except petitioner Dye) to steal a tractor-trailer loaded with Jack Daniels whiskey from a distillery in Lynchburg, Tennessee. On July 27, 1972, the trailer was loaded at the Lynchburg distillery with 1,250 cases of Jack Daniels whiskey for delivery to a warehouse in North Carolina. It was subsequently reported missing and was found empty in Monroe County, Tennessee, three days later. Meanwhile, in the early evening of July 29, two Knox County, Tennessee, deputy sheriffs, acting on a tip, went to the rear of a warehouse in Knoxville and observed a U-Haul van parked next to the building in a public alley. The body of the truck was padlocked, but the cab was unlocked and the key was in the ignition. They were joined by the chief deputy sheriff, who then left to obtain a search warrant. When he returned, a door at the rear of the warehouse was forced open and 100 cases of Jack Daniels whiskey were found in the building. The officers arranged for a truck to be rented, and when it was brought to the location they loaded the whiskey from the building into the truck. This work was completed by about 4:00

a.m. on July 30 (Tr., Motion to Suppress, p. 15); at that time both the U-Haul van, which had remained unopened, and the other rental truck that had been loaded with the whiskey were taken to the county jail. The U-Haul van was turned over to FBI agents unopened and unsearched.

On July 31 the FBI agents had a key made for the padlock on the rear of the truck, and on August 2 they obtained a search warrant from a federal magistrate on the basis of a detailed affidavit (Pet. App. G). The truck was searched on August 3, and 416 cases of Jack Daniels whiskey were removed from it. This whiskey was identified as part of the shipment stolen on July 27 or 28.

At a pretrial hearing, the prosecution stated that it would not rely on any whiskey taken from the warehouse and stipulated that the only whiskey that would be introduced in evidence was a portion of that taken from the U-Haul by the FBI (Tr., Motion to Suppress, p. 95). Petitioners moved to suppress the evidence from the van on the ground that it was "tainted" by the alleged illegal prior search of the warehouse and seizure of the van by the Tennessee authorities.[1] At a pretrial hearing on the motion, only petitioners' co-defendant Frye (who

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[1]It appeared that, while the chief deputy sheriff had been alerted by an informant to the fact that Jack Daniels whiskey had been loaded and unloaded at the warehouse "practically all day" on July 29 (Tr., Motion to Suppress, p. 32), the search warrant he obtained made no reference to the whiskey but was for an outboard motor (*id.* at 29, 37). It was also uncertain whether the search warrant was obtained prior to any entry into the warehouse or subsequent to an initial intrusion (*id.* at 37-38).

was subsequently acquitted) testified. He was a service station operator who stated that he had leased the U-Haul on July 29 to a person identifying himself as Douglas White. Petitioners made no claim at the hearing to an interest—either proprietary or possessory—in the U-Haul or its contents.

The district court concluded that petitioners were without standing to seek suppression of the whiskey and that, even if they had standing, there was probable cause for issuance of the federal warrant that was untainted by the previous activities of the state officers. The court of appeals agreed that petitioners had failed to establish standing; it therefore did not reach the issue of probable cause or "taint" (Pet. 33).

1. Petitioners contend both that they were in "constructive" possession of the U-Haul and its contents at the time of the FBI search and that, in any event, they had "automatic" standing to challenge the search.[2] Their claim of constructive possession is based upon evidence at trial that showed that they had been observed loading a portion of the stolen whiskey into the U-Haul earlier on July 29 (Tr. 249-252; Pet. App. H). The truck and its contents, they assert, were then "removed from [their] possession * * * as the direct result of the illegal search of the warehouse" (Pet. 12).

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[2]As indicated, only the petitioners charged with possession of stolen whiskey challenge the ruling of the district court denying them standing (Pet. 3-4). Of these petitioners, only Cupp received an enhanced sentence as a result of his conviction of possession; the others received concurrent sentences on the conspiracy and possession counts (Petitioner Ervin on the conspiracy, theft, and possession counts).

The fact that petitioners were in actual possession of the whiskey earlier on July 29 was, of course, known to them and should have been presented to the court at the supression hearing. The trial court was not obliged to reopen the matter of their standing based solely on their renewed objection to admission of the evidence at the close of the prosecution's case; see Wright, *Federal Practice and Procedure; Criminal,* § 676. Moreover, petitioners' earlier possession of the whiskey on July 29 does not demonstrate that it was "removed from [their] possession" at 4:00 a.m. on July 30; nor is it clear that the removal of the U-Haul was the "direct result" of the warehouse search. As the court of appeals observed (Pet. App. 30):

> When the state officers took possession of the U-Haul truck and drove it to the police station, none of the defendants was present. The police had been in the area for nearly nine hours, and no one had appeared to claim the truck. Though the body of the truck was padlocked, the ignition key was in the cab which was unlocked. The close proximity of the truck to the warehouse, and its apparent abandonment were justification for removing the truck from the public alley at 4:00 a.m. Compare *Cady* v. *Dombrowski,* 413 U.S. 433, 442-443 (1973).

Indeed, at no time prior to the search of the van on August 3, or at any time thereafter, did petitioners assert an interest in the van or its contents.

Petitioners contend, however, that they were not required to establish an interest in the U-Haul, but possessed automatic standing under the doctrine of *Jones v. United States,* 362 U.S. 257. For the reason stated in

Brown v. *United States*, 411 U.S. 223, however, this contention is without substance. As in *Brown*, the Court need not decide whether "the continued survival of *Jones*' 'automatic' standing" is warranted in the wake of *Simmons* v. *United States*, 390 U.S. 377 (411 U.S. at 229). For, as in *Brown*, petitioners "were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence *at the time of the contested search and seizure*" (*id.*, emphasis added.). The indictment charged petitioners with possession of stolen whiskey on or about July 28 (Tr. 8). There was evidence that petitioners were seen unloading whiskey from the hijacked trailer into the warehouse on July 28 (Tr. 241-244). There was also, as noted, evidence that they loaded part of it into the U-Haul on July 29. But, as already indicated, the U-Haul was not observed until the evening of that day, parked in an alley with the keys in the ignition, and was not seized until nearly nine hours later, following surveillance during which no one claimed possession of it. By the time of the seizure, petitioners' possession of the van had to every appearance terminated. Thus, as the court of appeals concluded (Pet. App. A, p. 33)

> The defendants * * * have not established that they are the ones "against whom the search was directed" or that they had a right of privacy with respect to the U-Haul truck or its contents. See *Jones* v. *United States*, 362 U.S. at 261.

Even assuming, however, that petitioners had standing to seek suppression of the whiskey, their motion to suppress was properly denied because there was probable cause for the issuance of the federal search warrant. The affidavit (Pet. App. G), besides attesting to

the theft of the whiskey, stated that "a reputable citizen of Knoxville, Tenn., who desires to remain anonymous," had observed Jack Daniels whisky being unloaded from a tractor-trailer in the alley behind the Knoxville warehouse on the morning of July 29 and a U-Haul van driven into the alley later that day. The chief deputy sheriff of Knox County advised the federal agents that "a confidential source * * * who had furnished reliable information on one other occasion," witnessed Jack Daniels whiskey being loaded from or into the U-Haul truck on the same day. The agents also established that the U-Haul van had been leased to a person who had shown no identification and had given a false address.

Petitioners insist that the sole information in the affidavit involving the loading of the whiskey into the U-Haul came from one (the chief deputy sheriff) "who had himself participated in the illegal search of the warehouse * * * and the seizure of the U-Haul truck" (Pet. 12), and that without this "tainted" information the affidavit did not contain probable cause. But the ultimate source of the information received from the sheriff was not the sheriff, but a confidential informant who had once previously proven reliable; and the presence of the U-Haul at the warehouse on the day on which the stolen whiskey was unloaded was confirmed by a disinterested citizen as well as another deputy sheriff. We submit that the affidavit contained probable cause, independent of knowledge or inferences derived from the search of the warehouse, to believe that the U-Haul contained stolen whiskey.

2. Petitioner Dye contends that he was denied due process when the district court rejected his motion for a new trial without granting him an evidentiary hearing at which to present polygraph evidence supporting the alleged recantation by the witness McFee of his trial testimony.

The district court (Pet. 42-53) carefully considered the deposition and other post-trial statements of McFee, which asserted, *inter alia*, that through promises, undue pressure, and corrupt means a federal agent had perverted McFee's testimony. The court concluded that these allegations were refuted both by detailed affidavits submitted by the government and by the record as a whole (Pet. 48). The court referred to particular affidavits, including that of a fellow prisoner of McFee following the latter's conviction, which showed a scheme by McFee to discredit his prior cooperation with the prosecution in an effort to ingratiate himself with the other defendants (Pet. 49). The court noted as well that McFee's purported change of testimony occurred after he and petitioner Dye had spent some three days together in the home of McFee's mother (Pet. 52). In these circumstances, the court did not abuse its discretion in denying the request for an evidentiary hearing as well as the motion for a new trial. *United States* v. *Johnson*, 327 U.S. 106; *United States* v. *Hoffa*, 382 F. 2d 856, 866 (C.A. 6).

3. Finally, petitioner Dye claims that he was denied due process because, he alleges, the court of appeals failed to consider five issues raised in his appeal (Pet. 8). This claim is founded on a sentence that appeared in the original decision of the panel, which suggested that the court found it unnecessary to reach several issues raised by Dye.[3] This identical contention was made in

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[3]The sentence read as follows (Pet. App. 39, 40):

> Dye has raised a number of other issues in his separate brief, but these either were not raised in the district court or concern themselves with matters of evidence, instructions and trial rulings which are not likely to be identical upon a retrial of his case.

The sentence was obviously included in the opinion by mistake, since Dye's conviction was affirmed.

Dye's petition for rehearing in the court of appeals. In response to that petition, the court of appeals ordered the deletion of the sentence (Pet. App. B) and entered a separate order denying Dye's petition for rehearing.[4] Thus, the claim that the court of appeals failed to consider issues raised by Dye is without merit, and in any event none of those issues warrants review by this Court.

Although the petition does not specify the issues that Dye contends were not considered, presumably they are the same issues raised in the petition for rehearing. One issue involved failure of the trial judge to give an instruction, but the record shows that petitioner did not object to the omission (Tr. 812-816) and, in any event, was not prejudiced by it[5]. Three other issues pertained to the denial of petitioner's motion for a judgment of acquittal

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[4]A copy of Dye's petition for rehearing in the court of appeals is being lodged with the Clerk of this Court. In denying Dye's petition for a rehearing, the court of appeals rejected his present contention. See Appendix, *infra*.

[5]The jury was not expressly instructed that it must find that Dye had actual knowledge of McFee's participation in a crime in order to convict him of being an accessory after the fact in helping to conceal McFee (Tr. 787). It was, however, told that "the theory of the Government [was] * * * that Dye knew that * * * McFee was the thief who participated in the theft of the whiskey * * * " (Tr. 802). It was also expressly told that it must find such actual knowledge with respect to the next count, misprison of felony, and it found Dye guilty of that offense.

on the ground of insufficient evidence; they were covered by the express finding by the court of appeals that, except for petitioner Burnette's conviction for theft, the evidence supported the verdict of the jury on all the counts (Pet. App. 25-26). The final issue involved a reference at trial to a prior conviction of Dye's some seventeen years earlier. The reference occurred in the course of the government's cross-examination of a character witness called by Dye. The sole purpose of the reference was to ascertain whether the witness was aware of the conviction (Tr. 363-364). The reference to the conviction was consistent with the well settled principle, illustrated by this Court's decision in *Michelson* v. *United States*, 335 U.S. 469, 483, that "* * * the prosecution has a right to test the qualifications of the witness to bespeak the community opinion." Cases concerning the use of prior convictions for purposes of impeachment of a defendant, upon which Dye relied in his court of appeals brief, are inapposite. Moreover, the court instructed the jury "to disregard any reference to a prior conviction of the defendant Dye for any purpose" (Tr. 776).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

1933-1975-02

APPENDIX

OCTOBER 14, 1974
JOHN P. HEHMAN, CLERK

No. 73-1876

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES EDWARD DYE
Defendant-Appellant

v.

ORDER

UNITED STATES OF AMERICA
Plaintiff-Appellant

BEFORE: EDWARDS, CELEBREEZZE AND LIVELY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein on behalf of the defendant-appellant James Edward Dye, it is concluded that no issues are raised therein which were not considered by the court upon the original submission of this case. The court further concludes that the petition for rehearing does not disclose any error in the opinion of the court prejudicial to the rights of defendant-appellant James Edward Dye.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

(signed) JOHN P. HEHMAN

Clerk